

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name KEMPER WINSTON H.
 (Last) (First) (Initial)

FILEDPrisoner Number B-64476Institutional Address P.O. Box 8500, Coalinga, **FFR 2 / 2008**CA 93216

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

WINSTON H. KEMPER

(Enter the full name of plaintiff in this action.)

vs.

JAMES A. YATES, WARDEN

(Enter the full name of respondent(s) or jailor in this action)

Case No. C07 4666 JSW
 (To be provided by the clerk of court) (PR)

PETITION FOR A WRIT
 OF HABEAS CORPUS

Read Comments Carefully Before Filling InWhen and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

ALAMEDA SUPERIOR COURT OAKLAND, CA

Court

Location

- (b) Case number, if known 146380

- (c) Date and terms of sentence _____

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No _____

Where? COALINGA, CALIFORNIA 93210

Name of Institution: PICASANT VALLEY STATE PRISON

Address: P.O. BOX 8500

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

FIRST DEGREE BURGLARY, PENAL CODE # 459

petition? Yes X No

(c) Was there an opinion? Yes X No

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes No X

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes No

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28

U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: SUPERIOR COURT

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

a. SAME ISSUES RAISED ON DIRECT APPEAL - ATTACHED

b. INEFFECTIVE ASSISTANCE OF COUNSEL - VINDICTIVE

c. PROSECUTION - PROSECUTOR MISCONDUCT - RESTITUTION

d. VIOLATION AND BRADY VIOLATION - PERJURY.

Result: DENIED Date of Result: 8-8-06

II. Name of Court: FIRST APPELLATE DISTRICT COURT

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

a. INEFFECTIVE ASSISTANCE of COUNSEL

b. PROSECUTORIAL MISCONDUCT

c. _____

d. _____

Result: DENIED Date of Result: 11-27-06

III. Name of Court: CALIFORNIA SUPREME COURT

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

a. INEFFECTIVE ASSISTANCE of COUNSEL

b. PROSECUTORIAL MISCONDUCT

c. TRIAL COURT FAILED TO INSTRUCT ON SPECIAL

d. ALLEGATION AND PROSECUTOR WITHHELD EVIDENCE

Result: DENIED Date of Result: 7-11-07

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: _____ Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes _____ No X

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

1 need more space. Answer the same questions for each claim.

2 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
3 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
4 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

5 Claim One: Ineffective Assistance of Counsel

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7 Supporting Facts: Trial Counsel Michael Lew who was the fourth attorney
8 assigned to my case by Public Defender, failed to investigate
9 or to interview witnesses. I met Mr. Lew on the morning of
10 trial.

11 Claim Two: Prosecutorial misconduct - prosecutor knowingly Filed
12 a false information in the Superior court.

13 Supporting Facts: On 12/12/03 Prosecutor Micheal O'Connor filed an
14 information in Superior Court charging petitioner with a special
15 allegation, the Judge in preliminary hearing had dismissed as
16 being factually unsustainable. PX 64-65

17 Claim Three: Violation of 6th Amendment Right to a fair trial.

18
19 Supporting Facts: Testimony of key witness who possessed exculpatory
20 evidence was not presented to the jury (Officer Davidson). see

21 claim Four and video interview. He
22 Possessed MY Brown coat. And his absence
23 From trial went unexplained.

24 If any of these grounds was not previously presented to any other court, state briefly which
25 grounds were not presented and why:

26 N/A

27 see attached Pages 6(a) 6(b); and
28 MEMORANDUM (Optional)

1
2 Claim Four: Suggestive Identification Process. R.T. 322, 340-41

3 Supporting Facts: The witnesses at scene of crime said perpetrator
4 was wearing only a white T-Shirt and green sweat pants. Yet, at trial
5 it was brought out that defendant at time of arrest had on a jacket
6 and dark clothes. It was the Prosecutor suggestion to Police/Jury
7 that defendant was the perpetrator.

8 Claim Five: Allowing the other - crimes evidence constituted a vio-
9 lation of constitutional due process. R.T. 46-51

10 Supporting Facts: Trial court allowed prosecution to introduce into
11 evidence that defendant committed a residential burglary in Berkeley
12 on April 16, 1991.

13 Claim Six: Court allowed bailiff to stand in witness stand during
14 defendant's testimony. In violation of due process. R.T. 462-463

15 Supporting Facts: Bailiff was allowed to manhandle witness throughout
16 petitioner's testimony over defense objection.

17 Claim Seven: Intrvcting the jurors that other - crimes evidence need
18 only be proved by preponderance of evidence ambiguously conflicts with
19 the overall Burden of Proof beyond a reasonable doubt and was likely
20 in this case to be misconstrued by the jury. R.T. 746

21 Claim Eight: Ten days prior to my present incarceration state prison
22 released me. Illegally keeping my money. The court in this convic-
23 tion imposed a \$5,000 restitution on me deriving from above illegal
24 act, (5,000 Dollars). R.T. 473

25 Claim Nine: For the aforementioned reasons and the fact of my ACTUAL
26 INNOCENCE. Trial court refusal to permit discovery of witness David
27 Harris alledged misdemeanor (1995) misconduct, etc. deprived me of a
28 fair trial. (R.T.P. 223). The credibility of Harris character remains

b(a)



1 a mystery. P.C. 118 and 118 (a) in general. Charge against complaining wit-
2 ness David Harris.

3 Claim Ten

4 Vindictive Prosecution: Over three and one half months after I was arrested.
5 After I filed a Marsden Motion/and charges against complaining witness David
6 Harris was sought. The District Attorney enhanced charges against ^{ME}. This
7 contention is fully supported by U.S. v. Goodwin. (FULL EVIDENTIARY HEARING
8 REQUESTED). (enhanced charge 11-19-03) P X 64-65

9 Claim Eleven: Prosecutor Misconduct

10 I talked to Transport Officer Davidson about my arrest. I was in process of
11 talking about my arrest at Parole Hearing. Where poor eye-sight and attorney
12 advice, advised me to stop. This is in total contradiction to District
13 Attorney assertions I did not assert my innocence R.T. 648.
14 (FUUL EVIDENTIARY HEARING REQUESTED).

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6(B)

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MEMORANDUM

OPTIONAL CONSIDERATION

Winston Kemper B-64476
P.O. Box 8500
Coalinga, CA 93210
P.V.S.P. B-5 129

Prosecutor - Public Defender Misconduct

The Prosecutor and Public Defender erased key elements in description and action of suspect(s). (P. 558 REPORTER TRANSCRIPT).

911 Tape: man jumping fence Prosecution: Man static at fence
Opn. Brf. Page 6-7. Dispatcher: Green eyes, mine are brown, my pants green, brown hair, mine is grey, my coat is brown, Police Report. You realize how serious this is from jury comment regarding my brown coat; jury comment exhibit (1). This is an obvious typo. The Point, there is a clear description discrepancy compounded by Officer Dauer p. 322 "He wore dark clothing," after one day recess and being briefed by prosecutor, pp. 340-41, and showing him my pictures, Officer Dauer's story changed, "That's what he wore!" Clearly suggestive identification. Dispatcher gave a description; p. 326 (after being briefed Officer changed story, "There was no description" pp. 336-37) original description p. 558 P. 367 Direct Examination Prosecutor did not give Officer Diotoleni independent opportunity from his notes to describe defendant she immediately showed him pictures of me. This is an outrageous case of suggestive identification in violation of U.S. v. Burdeau, 168 F.3d 352 "An in court identification procedure in which the witness points out the Defendant, who is seated at the table with counsel, is inherently suggestive and of minimal value," my opinion there is no difference in being pointed out from a table or pictures, in my case clothes being the



1 key factor. A none suspecting jury believes this is convincing
2 and legal evidence (3 say I had no coat) exhibit (1). During a
3 pretrial video interview with Public Defender Ms. Browne, I
4 mentioned Officer Davidson had possession of my brown coat. There
5 were witnesses to my recycling (diagonal house and see attached
6 01/06/04 Motion), and Harris attacking me with bat. Prelim. p. 56.

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1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases: Civil Rights Violation CDC illegally holding my money- Penal
4 Code 1202-4 (C). Denied Fair Trial-35 C.R.2d 219 People v. Santos
5 U.S. v. Burdeau 168 F.3d 352; Crawford v. Washington 124 S. CT. 1354;
6 Ohio v. Roberts 448 U.S. 56; U.S. v. Griffin 85 S. CT. 1229; U.S. v. Doyle
96 S. CT. 2240; Brown v. Borg 951 F.2d; Brady v. Maryland - U.S. -
7 Do you have an attorney for this petition? Yes _____ No X

8 If you do, give the name and address of your attorney:
9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.
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13 Executed on Feb. 23, 2008

Winston Kemper

14 Date

Signature of Petitioner

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20 (Rev. 6/02)
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P.O. Box 8500
Coalinga, Ca. 93210

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FEB 27 PM 1:4
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CASE #07-4666JSW(PR)

Clerk,

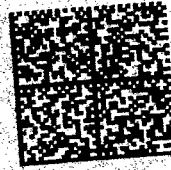
I wrote you 2-5-08 seeking Time extension. I never heard from you.

Because of the Time Limit, I'm enclosing my only original Petition. Please send filed copy back.

Thank you

(Time extension was sought
on basis of lock down status
here.)

Winston Kemper



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